

October 2, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Application for Stay

Name of Petitioner: Southern Company

Date of Filing: August 6, 2002

Case Number: VES-0096

On August 6, 2002, the Southern Company Services, Inc.,^{1/} (Southern) of Birmingham, Alabama, filed with the Office of Hearings and Appeals (OHA) of the U.S. Department of Energy (DOE) an Application for Exception and an Application for Stay under the provisions of 10 C.F.R. § 1003.20. The Southern Application concerns various operating data pertaining to the firm's sale of electricity that the DOE Energy Information Administration (EIA) collects through Form EIA-411, "Coordinated Bulk Power Supply Program Report." EIA publishes this data, by state, in firm-specific form. In its exception request, Southern seeks authorization to have its revenue and sales data withheld from public release on grounds of confidentiality as well as serious hardship and burden. The exception application incorporates an Application for Stay of release of the information contained in Form EIA-411, pending resolution of the exception request.^{2/} This determination considers only the Application for Stay.

I. Background

The evaluation of an Application for Stay is governed by Section 1003.45 (b):

^{1/} According to the submission, the application "is submitted by Southern Company Services, Inc., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company, Gulf Power Company, and Savannah Electric & Power Company."

^{2/} The provisions of Section 1003.9 require that "[e]ach application, petition or request for OHA action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act or transaction, or are submitted in connection with the same proceeding." 10 C.F.R. § 1003.9. We have waived that requirement in this case.

(b) The criteria to be considered and weighed by the OHA in determining whether a stay should be granted are:

- (1) Whether a showing has been made that an irreparable injury will result in the event that the stay is denied;
- (2) Whether a showing has been made that a denial of the stay will result in a more immediate hardship or inequity to the applicant than a grant of the stay would cause to other persons affected by the proceeding;
- (3) Whether a showing has been made that it would be desirable for public policy reasons to grant immediate relief pending a decision by OHA on the merits;
- (4) Whether a showing has been made that it is impossible for the applicant to fulfill the requirements of an outstanding order or regulatory provision; and
- (5) Whether a showing has been made that there is a strong likelihood of success on the merits.

10 C.F.R. § 1003.45 (b). The Southern submission does not address nor satisfy these criteria and no stay is warranted in this case.

II. Analysis

Southern has not shown or even asserted that irreparable injury or immediate hardship or inequity will result in the absence of a stay. Southern asserts no immediate harm or injury from release of the EIA-411 data. Nor has the firm provided the kind of detailed factual material that would show that in the absence of an exception it would be harmed in any way by release of this very general data for its operations for the calendar year 2001. Southern has been providing this material to EIA for many years and EIA has been releasing the material. No harm is claimed to have resulted so far. Thus no need for the emergency relief provided by a stay has been demonstrated.

In its Application for Exception, Southern claims that the material it provides on Form EIA-411 is confidential under the Trade Secrets Act, and exempt from disclosure under Exemption 2, 4, and 7(f) of the Freedom of Information Act. Southern also argues that because of its size and scope of operations, the burden of filing the report falls more heavily on Southern than others. If this is so, *i.e.*, that Southern has more filing obligations than others, it is because of Southern's vast operations. *See supra* note 1. By the same token, however, the firm's resources are also vast and so it is not apparent that the relative burden upon Southern of filing Form EIA-411 is inequitable or disproportionate. More importantly, Southern is one of the largest groups of power utilities in the domestic economy and the data the firm provides is critical to the EIA's mission to provide policy-independent data, forecasts, and analyses that promote sound policy making, efficient

markets, and public understanding regarding energy and its interaction with the economy and the environment. After reviewing Southern's arguments, we find they are insufficient to support the claim that Southern will experience an injury or inequitable distribution of burdens.^{3/}

In the absence of the type of factual material that would establish hardship or inequity, there is nothing that would lead us to conclude the requested exception might be warranted. As a result, Southern has not demonstrated that it will succeed on the merits of the Application for Exception, and the Stay request fails on these grounds as well. 10 C.F.R. § 1003.45 (b).

III. Conclusion

In accordance with the above discussion, we find that a Stay is not warranted in this case, because there is no immediate jeopardy to Southern, and because Southern has not shown that it will succeed on the merits of the underlying Application for Exception. Consequently, the Department of Energy has determined that the Application for Stay filed by the Southern Company, on August 6, 2002, should be denied.

It Is Therefore Ordered That:

The Application for Stay filed by the Southern Company, Case No. VES-0096, on August 6, 2002, is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 2, 2002

^{3/} A claim of this type should include specific material and detailed, fact-based explanations as to how, specifically, in the case of Southern, its doing business in its particular competitive market area and with its customers and competitors will be harmed by release of this data. Such a showing should include consideration of the fact that when the data is to be released, it will be in aggregate form and, on average, more than one year old.